STATEMENT OF JUDGE A. THOMAS SMALL
ON BEHALF OF
THE JUDICIAL CONFERENCE OF THE UNITED STATES

Mr. Chairman and members of the subcommittee, I am A. Thomas Small, judge of the United States Bankruptcy Court for the Eastern District of North Carolina. I appear today on behalf of the Judicial Conference of the United States, the policy-making arm of the federal courts, to report on the actions taken by the federal judiciary to implement the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 [the "Act"], particularly the development of necessary new rules and forms. I serve as the bankruptcy judge representative to the Judicial Conference and am the immediate-past chair of the Advisory Committee on Bankruptcy Rules, having served in that capacity from 2000 to 2004. The present committee chair, Judge Thomas S. Zilly, is unable to attend because of pressing court business.

I appreciate this opportunity to share with you details of the hard work that the Judicial Conference and its committees have done so far in reviewing, understanding, and implementing this massive and complicated legislation within such a brief period of time. The Act exceeds 500 pages in length and affects virtually every aspect of bankruptcy cases. Among other things, it introduces the concept of a means test as a requirement of eligibility for chapter 7 relief, adds an entirely new chapter to the Code (chapter 15 governing cross border insolvencies), and creates new categories of debtors and cases (small business cases and health care businesses). The provisions of the Act generally take effect on October 17, 2005. Implementing the legislation on a timely basis presents a tremendous challenge for the judiciary.

I will address the actions taken by the Advisory Committee on Bankruptcy Rules [the "Advisory Committee" or "committee"] to develop rules and forms implementing the Act, which I understand is one of the subcommittee's principal concerns. Later, I will briefly discuss the

measures taken by other Judicial Conference committees and the Administrative Office of the United States Courts to implement the Act generally.

On April 21, 2005, (one day after the Act's enactment) the Advisory Committee held an organizational meeting here in Washington to devise a plan to carry out the Act's rules-related provisions. The Advisory Committee represents a wide spectrum of views and consists of 16 members appointed by the Chief Justice, who are well experienced and expert in bankruptcy law. The committee includes six article III judges, four bankruptcy judges, three private-sector attorneys, two law professors, and an official from the Department of Justice. In addition, the Director of the Executive Office for the United States Trustees and a bankruptcy clerk of court regularly attend and participate in the committee's meetings. The committee has been working closely and very productively with the Executive Office for the United States Trustees to develop the means testing form, a primary component of the Act. At the organizational meeting, the committee's chair tasked three subcommittees to address the business, consumer, and forms issues arising from the Act. Later, the chair tasked three additional subcommittees to address the Act's provisions on cross-border insolvencies, health care, and direct appeal provisions.

The Consumer Subcommittee met separately on May 6 and June 14; the Business Subcommittee met on May 5 and June 13; and the Forms Subcommittee met on May 6 and June 15. All the subcommittees have also conducted lengthy conference calls, usually lasting more than three hours. Their work product has been reviewed by a style subcommittee for clarity and consistency. The full Advisory Committee is holding a public meeting in Washington on August 3-4, 2005. At the meeting, the committee will consider approximately forty new or amended rules and changes to virtually all the Official Forms.

The groundwork for much of the Advisory Committee's work had been prepared and considered by the committee at its meetings in 2001 and 2002, when earlier versions of the Act appeared to be nearing passage in Congress. The committee worked on amendments to about thirty rules and changes to about twenty forms. Many of these earlier proposals remain largely unchanged or slightly refined and are part of the package now under consideration. Along with the committee's more recent consideration of the rules and forms, these records provide a rich source of information for anyone interested in the development of the rules and forms.

In accordance with established Judicial Conference procedures, all rules-related records are available to the public on request. Consistent with these procedures, the drafts of rules and forms considered by the committee at its earlier meetings, as well as all current draft rules and forms, have been and continue to be available to the public on request. The public may obtain a copy of any draft rule or form simply by contacting the Administrative Office. Likewise, all meetings of the full Advisory Committee are open to the public. Minutes of each meeting of the full Advisory Committee are posted on the judiciary's internet web site.

At the Advisory Committee's April organizational meeting, it was decided that a two-track process would be necessary to implement the Act because its impending effective date did not provide sufficient time to proceed under the regular rulemaking process, which ordinarily takes three years. The first track was to: (1) identify which rules-related provisions in the Act require an immediate response; and (2) develop interim rules and forms addressing these time-sensitive provisions well before the October 17 deadline so that the courts have adequate time to implement them. The second track will be to monitor the courts' experiences with the interim rules and forms, simultaneously proceeding with the regular rulemaking process and inviting

public comment beginning in August 2006 on converting the interim rules to permanent federal rules. At the same time, the committee would also publish for comment additional proposed rule amendments not included as part of the time-sensitive interim rules package.

Under the first track, interim rules will be circulated in mid-August 2005 to the courts with a recommendation that they be adopted without change as part of a standing or general order. The Advisory Committee considered, but rejected, recommending model local rules implementing the Act because many of the model local rules would necessarily conflict with existing federal Bankruptcy Rules, which are based on pre-Act law. Local rules cannot be inconsistent with the federal rules. Any amendment of local rules will have to await amendment of the federal rules through the regular rulemaking process, which cannot be accomplished in time to meet the Act's effective date. The committee concluded that the best vehicle to accomplish the Act's objectives was to develop interim rules and urge the courts to adopt them, while simultaneously monitoring the courts' experiences and working on permanent changes to the federal rules. The same process was followed on three separate occasions in the past when the Bankruptcy Code was amended in 1978, 1986, and 1994, and interim rules contemporaneous with the Act's effective date were issued. On each occasion, the courts uniformly adopted the committee's interim rules recommendations. I am confident that the courts will continue this tradition and adopt the interim rules now under consideration.

As a practical matter, the courts' discretion in adopting the amended and new rules is limited, because many of the Act's rules-related provisions will be implemented by amended or new Official Forms, which work in tandem with the interim rules and often are based on them. Unlike the recommended interim rules, however, the Judicial Conference itself authorizes the

Official Forms, which courts must "observe" under Bankruptcy Rule 9009. Thus, courts will have a real incentive to adopt the recommended interim rules in order to facilitate compliance with the mandatory Official Forms.

Courts will require several weeks to train staff and make appropriate arrangements to implement the interim rules and forms. Major modifications must be made to the Case Management/Electronic Case Filing software, which has now been deployed in virtually all the bankruptcy courts. The judiciary must quickly accomplish many other time-consuming and burdensome tasks, which I later describe, all of which require significant lead time. In addition, legal publishing firms require at least 60 days to make appropriate software changes and arrangements to mass-produce amended or new Official Forms. To meet these demands, the Advisory Committee has been working on an expedited timetable that expects the interim rules and forms to be completed and circulated to the courts by mid-August 2005. Achieving this ambitious goal has imposed enormous burdens not only on the Advisory Committee, but on the Committee on Rules of Practice and Procedure [the "Standing Committee"] and the Judicial Conference, all of which must review and approve these actions. Then the ninety bankruptcy courts and their administrative staff will have to adopt all the changes in their local systems. Carrying out this legislation has severely strained the judiciary, which is already under enormous pressure to cope with its day-to-day responsibilities in the administration of justice. Nevertheless, the judiciary is committed to fully and faithfully execute the Act's provisions.

Recommending interim rules and authorizing Official Forms without going through the regular Rules Enabling Act rulemaking process is an unavoidable expedient compelled by the Act's fast-approaching effective date. To meet the Act's deadline, the Advisory Committee has

devoted substantial time and effort in developing interim rules and forms that faithfully implement the Act. It has worked closely with the Executive Office for the United States Trustees. It has consulted with experts who participated in the legislation, who at times disagreed among themselves over the meaning of particular provisions in the Act, making the committee's job all the more difficult. It has reached out to many corners of the bar for assistance. It has relied on its members' varied experiences, including members who represent creditors and others who represent debtors in their private practice. All these efforts have been undertaken in an open fashion to ensure that the process remains transparent, a hallmark of the rulemaking process.

The Advisory Committee's work product is outstanding. But the committee recognizes the inherent limitations of its abbreviated review process. Any shortfalls in the committee's work will be identified and corrected beginning in August 2006, when the interim rules and the amended and new Official Forms will undergo the exacting scrutiny of the regular rulemaking process. The Rules Enabling Act rulemaking process is a painstaking and time-consuming process that ensures that the best possible rules are promulgated. Permanent changes to the Federal Rules of Bankruptcy Procedure and forms to implement the Act will take place during the second track in accordance with the rulemaking process as described below.

The Rules Enabling Act rulemaking process is set out in 28 U.S.C. §§ 2071-2077. In accordance with the regular process, the Advisory Committee will review the experiences of the bench and bar with the interim rules and forms with a view toward proposing permanent amendments to the Federal Rules of Bankruptcy Procedure and recommending any additional appropriate revisions to the Official Forms. At its spring 2006 meeting, the committee is

expected to approve and transmit the interim rules as proposed amendments to the federal rules, with or without appropriate revisions, to the Standing Committee at its June 2006 meeting with a recommendation that it approve publishing them for public comment. In addition, the committee will request that the package include an opportunity for the public to comment on the forms authorized in 2005. If approved, the interim rules and forms will then be published in August 2006 for a six-month period. Hearings will be scheduled at which the public can testify on timely request.

The Advisory Committee's reporter will summarize all comments and statements submitted on the proposed rules and forms. The committee will meet in spring 2007 and consider any changes to the proposed rules and forms in light of the public comment. If approved, the committee will transmit the proposed rules and forms to the Standing Committee in June 2007 with a recommendation that they be approved and submitted to the Judicial Conference at its September 2007 session. If approved by the Standing Committee and the Conference, the proposed rules will then be submitted to the Supreme Court for its consideration. Changes to the Official Forms, however, do not have to be approved by the Court and will take effect on a date designated by the Conference. The Court has until May 1, 2008, to prescribe the rules and transmit them to Congress. The rules then would take effect on December 1, 2008, unless Congress acts otherwise.

At each stage of the rulemaking process, the proposed rule amendments and forms will be subjected to exacting scrutiny. Participation of the bench, bar, and public in the rules process ensures that the procedural rules implementing the Act will be the best that we can conceive. The rules committees have completed a remarkable amount of first-rate work, yet much remains

to be done. These accomplishments are all the more impressive because they represent the work of volunteers, many of whom incur substantial monetary sacrifices in terms of lost income and all of whom sacrifice enormous amounts of time for the public good.

I have alluded in earlier parts of my statement to many other projects that the judiciary has undertaken to implement the Act. I now turn to address some of these important matters.

Members of the judiciary, including members of several Judicial Conference committees, judges, clerks, and staff at the Administrative Office of United States Courts [the "AO"] and the Federal Judicial Center [the "FJC"], have worked tirelessly to implement the Act by its general effective date. This work involves a cross-section of disciplines within the judiciary that require expertise in such areas as rules and forms, clerk's office procedures, bankruptcy administration, budget and accounting, information technology, statistics, training, human resources, and judicial education.

Information on the Act was quickly transmitted to the courts and clerks as soon as the law was enacted. Thereafter, judges, clerks, and other members of the judiciary were kept informed of issues that arise from the changes to the Bankruptcy Code, and given reports of progress on the judiciary's implementation of the Act. In addition to memoranda to the courts, the AO and the FJC have established web sites where information and analyses of the Act are posted for review and study by members of the judiciary. In order to implement the Act in an orderly, methodical, and coordinated fashion, Director Mecham determined that the AO's Office of Judges Programs would coordinate the multi-faceted implementation work.

Implementing the new law has required substantial on-going coordination with the Executive Office for the United States Trustees and meetings or exchanges with other such

agencies as the Internal Revenue Service, the Department of Health and Human Services, and the Census Bureau. Additionally, the AO has called upon many individuals and groups for assistance, including members of the Judicial Conference, article III and bankruptcy judges, clerks of court, and deputy clerks. Ad hoc working groups were created, new Judicial Conference subcommittees were formed, and a special advisory group of judges and clerks was called upon to help develop new policies and procedures for bankruptcy clerks' offices.

The implementation process is progressing according to projected time tables. At this point, we expect to meet all deadlines, although it will be a struggle to do so. It is not possible to provide a detailed recitation of all of the work in progress in this short testimony, but I can provide you an overview of some of the other major initiatives beyond the rules process.

Changes in Operating Procedures

Significant changes to the courts' operating procedures are underway. First, careful analyses of the Act to determine all the changes required in the courts' operating procedures were conducted. Thereafter, revised practices and procedures were developed to meet the requirements of the Act. Once a broad outline of the requirements and revised procedures were in place, significant changes were initiated to reprogram the judiciary's Case Management/Electronic Case Filing system. Additionally, the judiciary is developing guidelines and procedures to address various new procedures added by the Act, such as allowing *in forma pauperis* chapter 7 filings, handling copies of debtor-tax returns filed with the court, and instituting procedures for nationwide noticing for creditors.

Training

The FJC and the AO have planned and begun training for bankruptcy judges, bankruptcy clerks and bankruptcy administrators, and court staff, including case administrators in the clerks' offices who will use the revised CM/ECF system. Training occurs nationally at specifically designated seminars, at conferences, and via the "FJTN," the FJC's closed-circuit television broadcast channel. Many other groups have reached out to the AO for assistance or participation in their training plans.

Bankruptcy Administrator Program

The AO is working directly with the six bankruptcy administrator offices in the states of Alabama and North Carolina to prepare them to assume all the new duties and responsibilities required of them under the Act. First, careful analysis of the Act was conducted to pinpoint all the new duties, whether they are explicitly imposed on bankruptcy administrators by the Act or are needed to maintain parallel treatment with new duties imposed on United States trustees. The bankruptcy administrator offices must be educated as to the changes in the law, changes in the courts' operating procedures, and changes to the bankruptcy administrators' own duties and responsibilities, such as overseeing means testing and small business chapter 11 cases certifying consumer credit counseling and financial management courses, and taking on new audit and reporting responsibilities. The AO is in contact with each bankruptcy administrator office, and an inclusive seminar is planned for them well before the effective date of the Act. In addition, current bankruptcy administrator procedures and manuals will have to be revised substantially, and changes will have to be made to their automated case management systems.

Statistics

Major changes will be needed in the judiciary's statistical systems, both to adjust to the many changes in the bankruptcy system required in the Act generally and to comply with section 601 of the Act, which requires the AO to gather information and produce a whole new set of reports on consumer debtor cases. The AO has worked hand in hand with the Executive Office for the United States Trustees and with bankruptcy clerks to redesign the data input forms, reprogram the case management systems, design extraction programs, and build a whole new enterprise data system capable of receiving and processing the data.

Additional Judgeships

Authorization of additional bankruptcy judgeships by the Act was effective upon enactment. The Judicial Conference has notified all affected circuits, including those that did not receive the bankruptcy judgeships recommended by the Conference to Congress in early 2005. Some circuits have begun the appointment process, advertising their new vacancies and receiving applications for the positions. The AO is working to identify adequate space and facilities for these new judges and chambers staff.

We share a common interest in ensuring that the bankruptcy system as a whole is prepared on October 17, 2005, when most of the provisions of the Act are effective. The amount of work required of the judiciary to implement the Act is immense and costly, especially considering the short time frame available to accomplish the extensive revisions required of the existing systems. The work to date has been impressive and remarkable, and we are confident that the deadlines will be met. Thank you.